showing that "he was performing his duties satisfactorily." We have ourselves used similar language. *See McLee v. Chrysler Corp.*, 109 F.3d 130, 134 (2d Cir. 1997). But in doing so we have not, of course, raised the standard set by the Supreme Court for what suffices to show qualification. *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254, (1981); *see also Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n. 44 (1977). Thus a mere variation in terminology between "qualified for the position" and "performing . . . satisfactorily" would not be significant so long as, in substance, all that is required is that the plaintiff establish basic eligibility for the position at issue, and not the greater showing that he satisfies the employer. The qualification prong must not, however, be interpreted in such a way as to shift onto the plaintiff an obligation to anticipate and disprove, in his *prima facie* case, the employer's proffer of a legitimate, non-discriminatory basis for its decision. As we have repeatedly held, the qualification necessary to shift the burden to defendant for an explanation of the adverse job action is minimal; plaintiff must show only that he "possesses the basic skills necessary for performance of [the] job." *Owens v. New York City Housing Auth.*, 934 F.2d 405, 409 (2d Cir. 1991) (internal quotation marks omitted). As a result, especially where discharge is at issue and the employer has already hired the employee, the inference of minimal qualification is not difficult

> to draw. *See Gregory v. Daly*, __ F.3d __, 2001 WL 293086, at *8-9 (2d Cir. Mar. 27, 2001).

Slattery, 248 F.3d at 93.

Incidently, although the Petitioner characterizes the *Slattery* opinion as requiring that an employee show basic eligibility for the position, the Second Circuit determined that the plaintiff was qualified based on the fact that he had been performing the duties of the position for seven years. *Id.*

The reason that the focus is on the employee's performance rather than the question of whether the employee meets the requirements initially stated by the employer at the time of hire, was stated as follows by the Court in *Loeb*:

> We can assume that, unless the employee's job has been redefined, the fact that he was hired initially indicates that he had the basic qualifications for the job, in terms of degrees, certificates, skills and experience.

Loeb, 600 F.2d at 1013 n. 10.

The Fifth Circuit's opinion in *Bienkowski* was merely an extension of the assumption set forth by the First Circuit in *Loeb*. In *Bienkowski*, the Fifth Circuit cites to *Loeb* for the proposition that an employee's initial qualification for the position in question can be assumed from the fact that he was hired. The Fifth Circuit than stated that, given this assumption, the employee need only show that he had not lost the initial qualification through physical handicap, loss of professional license, or some other occurrence that

rendered him unfit for the job in order to establish that he was qualified for the position at the time of termination. *Bienkowski*, 851 F.2d at 1506 n. 3.

From the foregoing, it is apparent that all of the Circuit Courts logically assume that an employee met the initial requirements for the position by virtue of the fact that he was hired for it. The Circuit Courts then look to indicia of continued qualification, such as the employee's performance or lack of an occurrence that renders the employee unqualified, to determine whether the employee remained qualified at the time of discharge. Accordingly, the Circuit Court's opinions on this issue are consistent with each other and with the opinion rendered by the Third Circuit in this case, such that this Court's exercise of its supervisory powers is not justified.

CONCLUSION

For all of the above reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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